MBF PROPERTY SERVICES SDN BHD

v.

MADIHILL DEVELOPMENT SDN BHD (NO 3)

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-60-1996]
27 AUGUST 1998

CIVIL PROCEDURE: *Execution - Stay - Special circumstances - What constitutes - Merit in appeal - Financial losses - Ability to pay damages - Whether appeal if successful would be rendered nugatory*

This was an application by the plaintiff for a stay of execution pending its appeal to the Court of Appeal against an earlier decision of the instant court dismissing its action against the defendant and allowing the defendant's counterclaim for trespass and nuisance.

Held:

[1] The 'special circumstances' test is still the law on stay of execution pending appeal. The court will not deprive a successful party of the fruits of his litigation pending an appeal by the unsuccessful party unless the latter can show special circumstances. That there could be merit in the plaintiff's appeal was not a special circumstance; neither was the possibility of the plaintiff facing financial losses; nor was the plaintiff's ability to pay the defendant damages.

[2] In any case, the plaintiff's appeal, if successful, would not be rendered nugatory. The plaintiff could always reconstruct the road traversing the defendant's land.

[Plaintiff's application for stay dismissed.]

Case(s) referred to:

Che Wan Development Sdn Bhd v. Cooperative Central Bank Bhd [1989] 2 CLJ 584 ***(foll)***

Dyson v. AG [1911] 1 KB 410 ***(refd)***

Kerajaan Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701 ***(refd)***

Kerajaan Malaysia v. Dato' Hj Ghani Gilong [1995] 3 CLJ 161 ***(refd)***

MBF Property Services Sdn Bhd v. Madihill Development Sdn Bhd & Ors [1998] 1 CLJ Supp 110 ***(refd)***

MBF Property Services Sdn Bhd (No 2) v. Madihill Development Sdn Bhd [1998] 4 CLJ 136 ***(refd)***

Perwira Affin Bank Berhad v. Hj Zakaria Haji Ismail & Ors [1998] 2 CLJ 770 ***(foll)***
All Persons In Occupation Of The House And The Wooden Stores Erected On A Portion Of Land Held Under Grant No: 26977 For Lot 4271 In The Township Of Johor Bahru, Johor v. Punca Klasik Sdn Bhd [1998] 5 CLJ 49 ***(foll)***
See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 ***(not foll)***
Stone v. Bolton [1949] 1 All ER 237 ***(refd)***
Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1993] 1 MLJ 113 ***(refd)***
Tneoh Hong Seng v. Dayani Sdn Bhd [1998] 2 CLJ Supp 79 ***(foll)***
Wu Shu Chen v. Raja Zainal Abidin Raja Hussin & Anor [1995] 2 CLJ 353 ***(refd)***

Other source(s) referred to:
The Britannica World Language Edition Of The Shorter Oxford English Dictionary

For the plaintiff - Krishna Roy Screenivasan; M/s KK Chong, Chai, Koo & Partners
For the defendant - Andrew Wong Fook Hin; M/s Andrew Wong & Co.

Reported by Alex KC Lee

JUDGMENT

Abdul Malik Ishak J:

By encl. 81, the plaintiff sought a stay of execution of my judgment that was arrived at after a full lengthy trial pending the disposal of the appeal to the Court of Appeal. That judgment of mine was written and circulated to all parties towards the later part of 1997 *vide MBF Property Services Sdn Bhd v. Madihill Development Sdn Bhd (No 2)* [1998] 4 CLJ 136 (hereinafter referred to as the "second judgment"). The first judgment, on a preliminary point, has since been reported vide *MBF Property Services Sdn Bhd v. Madihill Development Sdn Bhd & Ors* [1998] 1 CLJ Supp 110, where all the parties were contented as there was no appeal at all. As Martin Luther King, Jr. in "Strength to Love" once said: "Morality cannot be legislated but behaviour can be regulated. Judicial decrees may not change the heart, but they can restrain the heartless." The second judgment must have changed the "heart" and prompted the appeal for the plaintiff must have felt that "extreme law is often extreme injustice" (Terence, Heauton Timoroumenos). There was no injustice in the second judgment because it was based on the evidence, basically factual, that transpired in the course of the trial.

Mr. Krishna Roy Sreenivasan for the plaintiff argued that a stay should be granted as there were merits in the appeal. Mr. Andrew Wong Fook Hin for the defendant argued to the contrary.

The Law

The nugatory approach propounded by the Court of Appeal in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299 was never followed by the current crop of High Court Judges. In simple terms that approach meant that the court must consider whether unless a stay was granted the appeal if successful would be rendered nugatory. In *Punca Klasik Sdn Bhd* [1998] 5 CLJ 49, I did explain that See Teow Guan did not consider the Federal Court cases of *Kerajaan Malaysia v. Jasanusa Sdn Bhd* [1995] 2 CLJ 701 (FC) and *Kerajaan Malaysia v. Dato' Hj. Ghani Gilong* [1995] 3 CLJ 161 (FC) and I proceeded to say:

> These two authorities from the highest court in the country, in no uncertain terms, entrenched the special circumstances approach in the context of a stay of execution of a judgment and, I may add, a fortiori it must also be extended to apply to an application for a stay of proceedings in order to preserve the integrity of an appeal.

In my judgment, the law governing a stay of execution pending an appeal has not changed and the special circumstances approach still applies. The governing principle would be that the court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can show special circumstances. Mohd. Hishamudin bin Mohd. Yunus J in *Tneoh Hong Seng v. Dayani Sdn Bhd* [1998] 2 CLJ Supp 79 and Alauddin bin Mohd Sheriff J in *Perwira Affin Bank Berhad v. Haji Zakaria bin Haji Ismail & 7 Ors* [1998] 2 CLJ 770 vigorously applied the special circumstances approach in their judgments.

What Are The Special Circumstances Relied Upon By The Plaintiff?

In encl. 80 para. 8, Auw Yang Ho deposed that there were merits in the plaintiff's appeal and it was ingeniously argued that a stay should be granted. But merits in a plaintiff's appeal has never been considered to be part and parcel of the special circumstances approach. This can be seen from the judgment of NH Chan J (now JCA) in *Che Wan Development Sdn Bhd v. Cooperative Central Bank Bhd* [1989] 2 CLJ 584 which was applied in *Punca Klasik Sdn Bhd (supra)*. Moreover, no attempts at all were made to show why my findings in the second judgment were wrong and should be overturned. It must be emphasised that the whole trial as demonstrated in the second judgment proceeded on pure facts and nothing else. It was never disputed that the defendant was the registered owner of Lot PTD 26138 and neither was it disputed that the plaintiff had constructed a tarred road right across the defendant's land. This was pure trespass which trespass was not tolerated by the defendant. It was also not disputed that the defendant took a course of

action which was quite reasonable in the circumstances by erecting concrete bollards on the defendant's land thus preventing usage of the tarred road by the purchasers of the plaintiff's projects described as Zone 1 and Zone 2 in the second judgment. Trespass is a serious intrusion into one's domain. It is an ugly word. Till today, the plaintiff continues to trespass on the defendant's land. I said solemnly in the second judgment:

> In my judgment the plaintiff trespassed into the defendant's land. The plaintiff knew that they had trespassed and in law every continuance of a trespass is a fresh trespass and in respect of which a new cause of action arises from day to day so long as the trespass continues and persists. This is in fact actually happening in the present case. Up to this very day, the trespass by the plaintiff is continuing and it will remain unabated.

Trespass was not the only nightmare that the defendant had to reckon with. There was also nuisance of a kind that flow within the purview of *Stone v. Bolton* [1949] 1 All ER 237. Building an access road cutting across the defendant's land must be a nuisance that cannot be described in simple terms. It interfered with the defendant's enjoyment of their own land. In the second judgment, I said stoically:

> On the facts there was nuisance occasioned by the plaintiff onto the defendant. That nuisance was permanent in nature as the plaintiff contemplated the access road built on the defendant's land to service the purchasers of both zones.

These were samples of the findings of facts made by me as seen in the second judgment and no appellate court would upset it. I have the added advantage of seeing the witnesses while the appellate court merely reads the cold print of the printed evidence: *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1993] 1 MLJ 113 SC. The plaintiff has no ground to stand on. Lodging an appeal against the second judgment can never be construed as special circumstances *(Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin bin Raja Hussin & Anor* [1995] 2 CLJ 353).

At para. 9 of encl. 80 the plaintiff raised the issue of public interest. But alas issues of law alleged to have elements of public interest were not pleaded at all and to confound the matter further no evidence was led on this issue and neither was there submission on it in the course of the trial. A reading of the second judgment would clearly bear this out *(Punca Klasik Sdn Bhd (supra)).* I am not prepared to grant a stay as it would deprive the defendant of the fruits of their success after a full blown trial and drive them "from the judgment seat" (*Dyson v. A.G.* [1911] 1 KB 410 at p. 419 (CA)).

It was sought to argue that if the stay was not granted, the appeal, if successful, would be rendered nugatory. *The Britannica World Language Edition Of The Shorter Oxford English Dictionary* defines nugatory to mean "trifling, worthless, of no force, invalid, useless, futile, inoperative." I am constrained to say that in the event the plaintiff succeeds in their appeal, the plaintiff would be free to re-construct the road cutting across the defendant's land and in that sense the plaintiff's appeal would not be rendered nugatory. Be that as it may, there was not a single allegation made to show that the defendant was insolvent and unable to reimburse the plaintiff of any financial loss if the appeal were to succeed *(Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin bin Raja Hussin & Anor (supra))*. In *Punca Klasik Sdn Bhd (supra)*, I was prepared to evict the plaintiffs there from certain lands that will result in the demolition of certain buildings occupied by the plaintiffs there and yet I ruled that these were not special circumstances. In *Che Wan Development Sdn Bhd v. Cooperative Central Bank Bhd (supra)*, NH Chan J (now JCA) ordered the registration of the charge to be cancelled and the titles to be returned to the plaintiff. His Lordship too had to reckon with the fact that if the defendant succeeds in its appeal, it would have to institute proceedings against eleven purchasers yet his Lordship held that these were not special circumstances. In *Perwira Affin Bank Berhad (supra)*, the order was for the sale of the lands and the risk of the house being demolished yet the court held that it did not qualify as special circumstances. In *Tneoh Hong Seng (supra)* the fact that the appellant would not be restored to its original position should a stay be refused and in the event the appeal was successful was held not to be special circumstances.

The plaintiff was concerned about third parties. It was argued that the purchasers of factories from the plaintiff would have no access road and for this reason the stay should be granted pending the appeal. My answer would be simple. It was not the concern of the defendant to worry about third parties. The fault was entirely on the plaintiff's part. It was also argued that the plaintiff may have to pay huge losses and damages to its purchasers. The answer to this would be this. It was a mere allegation devoid of merit and unsupported by evidence. In any event financial loss can never constitute special circumstances.

An argument was advanced that there was a road reserve on the defendant's land and, consequently, the title could be amended and for that reason the stay should be granted. With respect, there was no evidence that there was a road reserve on the defendant's land.

The letter from Puan Aminah bte Hashim, the Land Administrator, Johor Bahru, marked as "D22" in the second judgment was favourable to the defendant. It showed once and for all that there was no "simpanan jalan yang merentasi di atas tanah tersebut" and it thus sealed the fate of the plaintiff forever, till doomsday. This ground must therefore fail and no stay should be granted to the plaintiff. Somehow it was ingeniously argued that the defendant will not suffer any loss or damage if the stay was granted. This argument was purely fashioned to aid the plaintiff without taking into account that the defendant was entitled to the fruits of their success. It was a mischievous argument as it has nothing to do with the plaintiff. The special circumstances approach must relate to the plaintiff and not the defendant. As Thomas More in "Utopia" said:

> They have no lawyers among them in Utopia for they consider them as the sort of people whose profession is to disguise matters.

Shakespeare once remarked in Henry VI, Part II, III, i that:

> The first thing we do, let's kill all the lawyers.

But without lawyers the law would not be developed by the judges. "There is no better way of exercising the imagination than the study of law. No poet ever interpreted nature as freely as a lawyer interprets the truth" (Jean Giraudoux, Tiger at the Gates).

Finally, it was argued that the defendant was entitled to general damages for which the plaintiff was in a position to pay. This argument sought to influence this court to allow the stay notwithstanding that the plaintiff continues to trespass onto the defendant's land. This court will never and will not condone trespass. This court frowns at trespassers, all and sundry, be they high or low. The stay should be denied. Justice must be meted out to the defendant in big doses. For these reasons, encl. 81 was dismissed with costs.